Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

KENNETH R. GAGER and DEANNA A. GAGER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES NEGLIGENT SUPERVISION AND TRAINING OF POSTAL SERVICE EMPLOYEES IN THE DETECTION OF MAIL BOMBS FALL WITHIN THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT AND/OR THE POSTAL MATTERS EXCEPTION?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Kenneth R. Gager and Deanna A. Gager, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case entered on June 26, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Kenneth Gager; Deanna Gager v. United States Of America*, No. 97-15710 (9th Cir. 1998) (App. 1-12). The judgment of the district court in *Kenneth Gager; Deanna Gager v. United States Of America*, D.C. No. CV-96-00782-PMP (D. Nev. Mar. 31, 1997) is not published (App. 19).

STATEMENT OF JURISDICTION

A. Jurisdiction of the District Court

On August 23, 1996, Plaintiffs-Petitioners (hereinafter referred to as "Petitioners") filed their Complaint against the United States of America for injuries Petitioners suffered as a result of a mail bomb which was delivered to Petitioners by the United States Postal Service. The United States District Court, District of Nevada, had original jurisdiction in this matter pursuant to the case arising under the Federal Tort Claims Act, 28 U.S.C. §§ 2671, *et seq.*, and the United States District Court was vested with jurisdiction pursuant to 28 U.S.C. § 1346(b).

B. Jurisdiction of the Ninth Circuit Court of Appeals

On or about November 25, 1996, United States of America filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. Both parties filed their respective briefs, points and authorities and memoranda of law concerning the Motion. On or about March 27, 1997, the District Court, by and through The Honorable Philip M. Pro, issued its written Order granting United States of America's Motion to Dismiss for Lack of Subject Matter Jurisdiction. Judgment was entered on that Order on March 31, 1997 (App. 11-19).

A timely Notice of Appeal was filed by Petitioners on April 18, 1997 pursuant to FRAP 4.

28 U.S.C. § 1291 provides that the Court of Appeals is vested with jurisdiction of all final decisions of the District Courts of the United States. 28 U.S.C. § 1294(1) provides that an appeal from the United States District Court, District of Nevada, shall be made to the Ninth Circuit Court of Appeals. Therefore, the Ninth Circuit Court of Appeals was vested with jurisdiction.

C. Jurisdiction of the Supreme Court of the United States

On June 26, 1998, The Ninth Circuit Court of Appeals filed an opinion affirming the judgment of the district court.

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1346(b) provides:

> "Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. § 2680 provides: The provisions of this chapter and section 1346(b) of this title shall not apply to –

> "(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> "(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."

STATEMENT OF THE CASE AND FACTS

A. Factual History

The essence of Petitioners' claims against United States is that United States failed to properly train and supervise the Postal Service employees who were involved in the delivery of the mail bomb to Petitioners. United States failed to train and supervise said employees in the detection of mail bombs, in the proper steps to take in the event a package was suspected of being a mail bomb, in assuming that said employees followed through on their training to take the necessary steps to detect mail bombs, and in making sure that those responsible for conducting the training of the employees followed through on the training of said employees.

Petitioners also allege that United States failed to take other necessary steps, in addition to the training, to detect mail bombs, and that United States accepted for delivery a matter which was non-mailable under the postal service regulations.

1. Facts[1]

On or about September 7 or 8, 1993, a package was delivered to Petitioners at their residence through the regular course of delivery by the United States Postal Service (an agent of the United States of America). This

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[1] All of the facts are based upon the allegations set forth in the Amended Complaint (App. 20-30), the Affidavit of Don Dibble (App. 31-37), the Affidavit of Beth Baca (App. 38-41) and the Affidavit of Eckley M. Keach (App. 42-43).

package was addressed to Kenneth R. Gager and delivered to him by the Postal Service through its employee and agent, Leanne Mary Emm, acting in and during her regular course and scope of employment or agency with the United States Postal Service (see attached Affidavit of Donald R. Dibble ("Dibble Affidavit")).

On or about September 8, 1993, Petitioners were at their home when Petitioner (Mr. Gager) proceeded to open the package. Immediately upon opening the package, it exploded. The package was a mail bomb. The mail bomb caused Petitioner serious, permanent and disabling injuries. This incident was entirely witnessed and experienced by Deanna Gager (Petitioner), who also suffered injuries of her own. The bomb also destroyed Petitioners' residence.

On or about September 8, 1993, mail carrier Leanne Emm was visited at her home by the Postmaster Jose Maes who informed Mrs. Emm that the package she delivered to the Petitioners' residence was indeed a mail bomb (see Dibble Affidavit). According to the mail carrier, the mail bomb was the size of a shoebox (see Dibble Affidavit). Also, the mail bomb did not contain a return address (see Dibble Affidavit).

Deanna Gager (Petitioner) originally retrieved the package from the family mailbox (see Dibble Affidavit). Upon picking up the package she immediately noticed that the package was extremely heavy (see Dibble Affidavit). Her attention was also drawn to the taping because the package was heavily wrapped with packaging tape (see Dibble Affidavit). Additionally, because of the heaviness of the package, Petitioner's attention was

drawn to the postage (see Dibble Affidavit). The package had approximately seven one dollar stamps pasted on the top of the package (see Dibble Affidavit).

Petitioners immediately noticed that the package had no return address in the upper left corner of the box (see Dibble Affidavit). In the middle of the top of the package was a white label with "Ken Gager" (Petitioner) and his correct home address typed on it (see Dibble Affidavit). The label also had, "Carson City, Nevada" typed on the top of the label (see Dibble Affidavit). The top of the label (above "Carson City, Nevada") appeared to have been ripped or torn off (see Dibble Affidavit).

The mail carrier, Leanne Emm, was never given any training by the Postal Service prior to delivering the mail bomb to Petitioners' residence (see Dibble Affidavit). After the mail bomb exploded, the Postal Service, through Postmaster Jose Maes, instructed the mail carrier on mail bomb detection (see Dibble Affidavit). Mrs. Emm believes that, had she been trained in mail bomb detection, she would have been suspicious of the package delivered to Petitioners' residence (see Dibble Affidavit). Mrs. Emm stated that she would have taken the necessary steps to ensure the safety of the public and fellow postal employees (see Dibble Affidavit).

Beth L. Baca has been a Postal Service employee in Las Vegas since 1982 (see Baca Affidavit). In 1989 or 1990, while she was working as a postal clerk, she received a mail bomb which was transmitted through the mail and resulted in the death of a woman. She indicates in her affidavit that, subsequent to that incident, and for several months thereafter, the Postal Service went about training

people in regard to the detection of mail bombs and the steps to take when a mail bomb was suspected. She further indicates that pamphlets were sent around that were used by the supervisors in training the clerks and carriers in the detection of mail bombs. Moreover, the first pamphlet that was sent out, she recalls, came from the main office of the United States Postal Service. This pamphlet listed a number of items to look for in the detection of mail bombs. She further indicates that there were several additional training sessions dealing with the detection of mail bombs, and that a pamphlet concerning the detection of mail bombs was placed on the wall in the post office in Las Vegas. She goes on to indicate that since that several month period in 1989 or 1990, when the Postal Service employees were trained in the detection of mail bombs, there has been no additional training concerning the detection of mail bombs.

In the Affidavit of Eckley M. Keach, he states that he spoke with the Postmaster for the City of Las Vegas, Cliff Rucker, on February 13, 1997 (see Keach Affidavit). The Postmaster advised Mr. Keach that the entire State of Nevada comprised one postal district known as the District of Las Vegas. That is, the postal employees who participated in the delivery of the mail bomb to Petitioners' residence, were part of the District of Las Vegas.

The importance of these two affidavits, in conjunction with the Amended Complaint, is clear (App. 20-30). Even assuming there was no national training, and any training concerning mail bombs should be done on a local level, the local level, being the District of Las Vegas, which comprised the entire state, had taken upon itself the task of training its employees in the detection of mail

bombs. Petitioners claimed in their Amended Complaint that in fact there was such a policy, which policy was not followed, i.e., the Postal Service employees who handled the mail bomb addressed to Mr. Gager (Petitioner) were not properly trained in the detection of mail bombs (App. 20-30).

Petitioners claim that there was a policy concerning the training of the Postal Service employees with regard to the detection of mail bombs. Petitioners further claim that Respondent was negligent in failing to properly train the Postal Service employees who delivered this mail bomb to Petitioners.

B. The Proceedings Below

On August 29, 1996, Petitioners filed their Complaint for Damages and Demand for Jury Trial (App. 20-30). Service was obtained on United States of America and on November 26, 1996, it filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction with accompanying points and authorities and exhibits.

There was a Stipulation and Order allowing Petitioners to have until January 13, 1997 to file its Opposition and giving the United States until January 31, 1997 to file its Reply.

On January 13, 1997, Petitioners filed their Opposition to Motion to Dismiss for Lack of Subject Matter Jurisdiction, a Counter motion for Leave to File Amended

Complaint, and a Counter motion to Conduct Limited Discovery.[2]

On January 31, 1997, United States filed its Reply in Support of Defendant's Motion to Dismiss. Thereafter, Petitioners filed a Supplement to their Opposition including additional affidavits on February 20, 1997.

On March 27, 1997, the District Court signed its Order granting United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction and denying Petitioners' Motion for Limited Discovery. The Judgment in a Civil Case was entered by the Court on March 31, 1997 (App. 19).

On April 18, 1997, Petitioners filed their Notice of Appeal. The Ninth Circuit Court of Appeals granted an extension until June 17, 1997 within which Petitioners filed the Appellants' Opening Brief.

On February 12, 1998, Petitioners Argued and Submitted their case to the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals affirmed the lower court's judgment and filed their opinion on June 26, 1998.

Petitioners argued to the Ninth Circuit alleging that there was an established policy of training and supervision in bomb detection that eliminated any possible choice involved in the Postal Service's decision, and that the district court erred in rejecting their request for limited discovery on that matter.

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[2] Without opposition, the District Court granted leave to file the Amended Complaint, and the parties and the Court proceeded on the Motion to Dismiss for Lack of Subject Matter Jurisdiction based on Amended Complaint.

The Ninth Circuit Court of Appeals held that a Postal Service decision to limit mail bomb detection training to sites where a known threat of danger existed in order to most effectively allocate resources is immunized from suit by the discretionary function exception to the Federal Tort Claims Act. In holding this, the Court found that the Baca affidavit was insufficient evidence to establish that there was a general Postal Service policy or regulation requiring training and supervision at all sites (App. 5). Additionally, the Court held that universal training was not provided because the Postal Service balanced many competing concerns (App. 7). The Court found that the main concern of the Postal Service was the resources and time involved in the training of mail bomb detection which took priority over the safety of the Postal Service's employees and patrons.

The Ninth Circuit Court of Appeals additionally held that Petitioners did not put forth sufficient facts to show that the evidence sought through the requested limited discovery existed. However, the Ninth Circuit acknowledged that the existence of a specific policy could influence the application of the discretionary function exception.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURTS MISAPPLIED THE DISCRETIONARY FUNCTION EXCEPTION OF THE FEDERAL TORTS CLAIMS ACT TO PETITIONERS' REQUEST FOR RELIEF AND THERE IS A SPLIT IN THE CIRCUITS WHICH MUST BE RESOLVED

The Petitioners' petition for writ of certiorari should be granted because the discretionary function exception of 28 U.S.C. § 2680(a) does not apply to Petitioners' request for relief. The first part of the test is whether the conduct at issue involves an element of judgment or choice. If a federal statute, regulation or policy provides a "specific course of action for an employee to follow" in a particular situation, then that employee's action or conduct is not discretionary. *Gaubert v. United States*, 499 U.S. 315 at 322 (1991) (quoting *Berkovitz v. United States*, 486 U.S. at 536). In other words, if a statute, regulation or policy exists, then the employee is not free to disregard the directives of those policies. *Gaubert*, 499 U.S. at 322. Furthermore, if an employee disregards the directives, then the FTCA's discretionary function will not shield the United States from liability.

In order to analyze this issue in the instant case, the Court should first focus on the conduct that Petitioners allege gives rise to this action. Specifically, Petitioners' claim is founded on the United States' failure to properly train and supervise its employees in the detection of mail bombs, and what to do in the event a mail bomb is suspected. As such, the Court should first determine whether the training and supervision of employees in the

detection of mail bombs and what to do when a mail bomb is suspected involves an element of judgment or choice.

The Ninth Circuit has determined in a number of cases that the discretionary function exception was not a bar from bringing tort claims when there was a policy to engage in certain conduct, or do a particular act (which was either not done or negligently done), or when there were readily ascertainable standards of safety which were not followed or followed negligently. In these situations, where there is the failure to comply with policy or with known safety standards, the Ninth Circuit has found the discretionary function exception not to apply.

In *Berkovitz v. United States*, 486 U.S. 531 (1988), an infant who received a polio vaccine contracted a severe case of polio. The family sued the United States claiming the Division of Biologic Standards was negligent in licensing the particular lot which caused the injury, alleging the licensing violated policy regarding the inspection and approval of polio vaccines. The government moved to dismiss for lack of subject matter jurisdiction based on the discretionary function exception.

The Court indicated it was the nature of the conduct that governs whether the discretionary function exception applies in a given case. The Court found that the discretionary function exception would not apply when a "federal statute, regulation or policy specifically prescribes a course of conduct for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S. at 536. The Court further held that under such a scenario there will

be no discretion for the discretionary function exception to protect.

The Berkovitz family claimed that the government licensed the vaccine "either without determining the vaccine complied with regulatory standards or after determining the vaccine failed to comply." *Berkovitz*, 486 U.S. at 543. The Court found that under either fact pattern, the discretionary function would not act as a bar to the claim.

The Court summarized the Berkovitz family's claims which survived the discretionary function exception as follows: the family alleged the government had adopted a policy of testing all vaccine lots for compliance with safety standards and preventing distribution of any unsafe lots to the public; and the government released a lot of the vaccine that did not comply with the safety standards. Although the Court indicated the family still had to prove those allegations in court, the family was entitled to proceed and was not barred by the discretionary function exception.

The *Berkovitz* Court relied upon a specific policy being in place regarding the screening of vaccine lots before their release. In the case at bar, Petitioners are not cognizant of whether there was a specific policy regarding the training and supervision of its employees in the detection of mail bombs and the steps to take if a package is suspected of being a mail bomb, and Petitioners requested an opportunity to conduct limited discovery in order to determine the answer to this issue. In the event that Petitioners are able to establish a specific policy regarding training and supervision of employees in this regard, relying on *Berkovitz*, it should be held that the

discretionary function absolutely has no application herein.

Based on the Affidavit of Beth Baca, it appears clear that there was a period of time subsequent to 1990 when the Postal Service within the District of Las Vegas was engaged in training and supervising its employees in the detection of mail bombs. The District of Las Vegas, according to Mr. Keach's Affidavit, also included the Postal Service area where Petitioners resided and where the mail bomb in the instant case was delivered. Thus, it appears from the information available to Petitioners at this time and supplied to the District Court that there was training and supervision undertaken by the District of Nevada, that the Postal Service carrier delivering the mail bomb to Petitioners' residence was never trained, and that had she been properly trained, she would have detected the mail bomb.

In *Faber v. United States*, 56 F.3d 1122 (9th Cir. 1995), Faber sued the United States for failure to warn of diving hazards in a national park. The United States moved for summary judgment on the basis of the discretionary function exception. The Court held at 1124:

> "However, in cases where the government is alleged to have committed negligence in the performance of a function such as that performed by a private citizen, rather than in the fulfillment of a broad policy-making duty, the government is subject to suit."

Faber contended that the government failed to warn of a dangerous condition. The Court held at 1125:

> Thus, a failure to warn involves consideration of safety, not public policy. It would be wrong to apply the discretionary function exception in a case where a low-level government employee made a judgment not to post a warning sign, or to erect a guardrail, or to make a safer path. Such a judgment would be no different than a judgment made by a private individual not to take certain measures to ensure the safety of its visitors. To interpret such a judgment as discretionary would be too expansive an interpretation of Congress' intent in creating the discretionary function exception. Therefore, in cases where the government has allegedly failed to warn, the use of the discretionary function exception must be limited to those unusual situations where the government was required to engage in broad, policy-making activities or to consider unique social, economic, and political circumstances in the course of making judgments related to safety."

In the instant case, Petitioners alleged that the Postal Service failed to properly train and supervise its employees regarding the detection of mail bombs. This is analogous to the issues presented in *Faber*. A review of the various regulations attached to Respondent's Motion makes it clear Respondent was, and is, aware of dangerous material being sent through the mails. In fact, the various regulations attached as exhibits to Respondent's Motion set forth certain steps to be taken when a suspicious package is detected.

Moreover, the specific mail carrier involved in this case, Mrs. Emm, indicates, (see Dibble Affidavit), that after she delivered the mail bomb, she was in fact trained

in the detection of mail bombs and what to do when detected. Obviously, the Postal Service had these training materials available, because within a very short time after this incident occurred, it in fact trained this particular mail carrier. Most importantly, Mrs. Emm indicates she probably would have detected the mail bomb had she been properly trained prior to delivering this package.

Whether to spend a short amount of time training its employees in what to look out for regarding mail bombs does not involve any broad-based policy-making activities or unique social, economic or political circumstances. Rather, as in the case of a private individual, it merely involves the exercise of care. Traditional standards regarding safety would dictate this minimal amount of training be provided to Postal Service employees.

Moreover, it is evident that the Clerks at the United States Postal Service offices have "stand ups" every Friday dealing with various issues. (Baca Affidavit). In these meetings the Supervisors discuss various safety issues with the postal employees. The fact that these meetings are already scheduled weekly and do not have a set agenda, dictates that it is unreasonable for the Postal Service to neglect teaching mail bomb detection techniques. It is evident that it would take a minimal amount of time to review a pamphlet regarding the detection of mail bombs coupled with the fact that postal employees were already in attendance at the "stand ups", there would be minimal expense involved with such training (App. 44-46). Therefore, the failure to train postal employees in mail bomb detection does not fall within the boundaries of the discretionary function exception

and there is no social, economic, or political policy reason to neglect training the United States Postal Service employees in mail bomb detection. Under the rationale of *Faber*, the discretionary function exception should not apply to the instant case.

In *Federal Express Corporation v. United States Postal Service*, 1998 FED App. 0231P (6th Cir.), the Court recognized that Congress invested the United States Postal Service with the "status of a private commercial enterprise." *Federal Express Corporation* (quoting *Loeffler v. Frank*, 486 U.S. 549, 556 (1988)). Additionally, Congress mandated that the general powers of the United States Postal Service include the authority to sue and be sued which waives its traditional sovereign immunity. *Federal Express Corporation*, (citing, 39 U.S.C. § 401(1)). The 6th Circuit further held that the Supreme Court has construed this provision to effect a general forfeiture of governmental immunity against private litigations which target the Postal Service. *Federal Express Corporation*, (citing *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512 at 516-20). In holding that the United States Postal service can be sued as any other business could, the Court stated that a governmental agency engaged in a commercial enterprise, as is the United States Postal Service, is indistinguishable as a commercial entity from a private firm or association. *Federal Express Corporation*, (quoting *Global Mail v. United States Postal Service*, 142 F.3d 208 at 216-17 (4th Cir. 1998)). Clearly *Federal Express v. United States Postal Service*, represents the notion that the United States Postal service can be sued, and that the lower courts erred by dismissing the case at bar due to the alleged lack of subject matter jurisdiction.

Additionally, a recent 4th Circuit case has held that the "sue-and-be-sued" clauses cannot be limited by implication unless there has been a clear showing of congressional intent to construe the clauses in a narrow sense. *Global Mail*, 142 F.3d at 212 (quoting *Federal Housing Administration v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490-91, 84 L.Ed. 724 (1940)). Moreover, the Court held that absent such a showing, agencies authorized to sue and be sued are presumed to have fully waived immunity. Finally, the Court in *Global Mail* held that when Congress launches a governmental agency into the commercial world and endows it with the authority to sue or be sued, the agency is not less amenable to judicial process than a private enterprise under like circumstances. *Global Mail*, 142 F. 3d at 213. Therefore, by launching the Postal Service into the commercial world and authorizing it to sue and be sued, Congress has removed the cloak of sovereignty and given it the status of a private commercial enterprise. *Global Mail*, 142 F. 3d at 214 (quoting *Leoffler*, 486 U.S. at 556, 100 L.Ed 2d 549, 108 S.Ct. at 1970, (1988). Accordingly, the district court and the Ninth Circuit Court of Appeals have erred by holding that there is not subject matter jurisdiction in the case at bar.

In *Routh v. United States*, 941 F.2d 853 (9th Cir. 1991), Routh sued the United States alleging negligence in the supervision of a road clearing project in which Routh was operating a backhoe for a company which had a contract to do the work for the United States. The United States moved to dismiss based on the discretionary function exception. Specifically, the Court focused on the issue of whether the actions of the government constituted the

type of judgment that the discretionary function exception was designed to shield. The Court held at 856:

> "Similarly, in this case the contracting officer's decision whether or not a given situation created a safety hazard in violation of the safety provisions of the contract was not a public policy decision."

The Court determined that the on-site decisions were not of the nature and quality that Congress intended to shield in tort liability because they were not based in public policy.

Similarly, in the instant case, whether to train and supervise employees in the detection of mail bombs and what to do if they are suspected is not the type of public policy decision which Congress intended to shield by the discretionary function exception. This type of safety measure is founded in basic principles of tort law, that is, what is the reasonable and prudent conduct for an actor to take.

Finally, in *Arizona Maintenance Co. v. United States*, 864 F.2d 1497 (9th Cir. 1989), Arizona Maintenance Company sued the United States for damage caused to its water system by blasting done by the United States in connection with the construction of the Central Arizona project. The government moved for summary judgment on the grounds that its decision to use dynamite blasting and how the blasting was conducted fell within the discretionary function exception.

This case created the first opportunity for the Ninth Circuit to review the discretionary function exception after the Supreme Court's clarification of the exception in

Berkovitz v. United States. After undergoing a thorough analysis of *Berkovitz* and prior Ninth Circuit opinions, the Court set forth the analysis to be applied when the discretionary function exception is raised concerning safety issues. The Court stated at 1504:

> "The appropriate analysis laid down by our own Ninth Circuit cases and consistent with *Berkovitz* can be summarized for purposes of this case as follows. The conduct of a government agency or employee is not immune from scrutiny as a 'discretionary function' simply because it involves an element of choice. It must be a choice rooted in social, economic or political policy. If it is a choice to be exercised within established objective safety standards, and the plaintiff's claim negligent in failure to follow such standards, the discretionary function exception does not apply.

In the instant case, the decision regarding the training and supervision of Postal Service employees in the detection of mail bombs and what to do if a package is suspicious is not the type of choice which is rooted in a social, economic or political policy. It is clearly a choice to be exercised within established objective safety standards. Established tort law lays a clear objective standard to be applied to the conduct of the Postal Service regarding this safety procedure, that is, the training and supervision of its employees regarding the detection of mail bombs. And as Ms. Baca has established, the Postal Service within the Las Vegas District has undertaken to train its employees in the detection of mail bombs. Obviously, this training did not include Ms. Emm because she was never trained. Nonetheless, the Postal Service made the

decision to train its employees, and once that decision was made, could not be negligent in the method in which it was carried out. The Postal Service was obviously negligent in failing to train Mrs. Emm properly, which resulted in damages in this case. As such, the United States' Motion to Dismiss based on the discretionary function should have been denied, as there is subject matter jurisdiction through the FTCA.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT DID NOT PROPERLY ADDRESS THE POSTAL MATTER EXCEPTION

28 U.S.C. § 2680(b) provides that Federal Tort Claims act liability does not extend to "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." This exception was intended to apply to situations where postal matter was lost, damaged or misdelivered by the Postal Service employees and agents. *Robinson v. United States*, 849 F. Supp. 799, 801 (S.D. Ga. 1994). *Robinson v. United States* appears to be the only case in which the victim of a mail bomb attempted to hold the Postal Service liable in tort. In *Robinson*, however, the issue turned on negligent transmission of the mail. 849 F. Supp. at 802. In the case at bar, *the issue is not negligent transmission of the mail but rather, negligent supervision and negligent training of the Postal Service employees and agents.* As a result, *Robinson* is inapplicable and the issue of whether § 2680(b) applies to negligent supervision and negligent training remains as one of first impression.

It should be understood that the plaintiffs in the *Robinson* case based their claim on the theorem that the Postal Service "negligently delivered a package enclosed with string in violation of the domestic mail manual." 849 F. Supp. at 800. Unlike Petitioners in the instant case, whose claim is based and founded upon the failure of the Postal Service to properly train and supervise its employees in the detection of mail bombs, the plaintiffs in *Robinson* specifically brought their suit claiming negligence in delivery of the package.

The Court in *Robinson* comments that the § 2680(b) exception:

> "Was intended to apply to the handling of mail and postal matter alone. This exception does not shield the Postal Service from the negligence of their employees in driving postal vehicles, for example, or in performing other duties not directly involving postal matter." 849 F. Supp. at 802.

Even though the *Robinson* Court defines the transmission to include the time from when the package is delivered to the post office until the package is delivered to the customer, should the mail carrier get into an automobile accident along the way, such negligence is not shielded by the exclusion. Nor, as the *Robinson* Court states, is an employee shielded from negligence in the performance of other duties, such as alleged by Petitioners in the instant case, in the training or supervision of employees in the detection of mail bombs.

The *Robinson* Court cites *Suchomajcz v. United States*, 465 F. Supp. 474, 476 (E.D. Pa. 1979), which reached a

conclusion different from its own. Therein, the Court held that § 2680(b) of the FTCA did not apply to all negligent acts by the Postal Service because that would oppose the intent of the Legislature. The Court quoted Judge Weinstein from the Eastern District of New York who stated:

> "congress was concerned with shielding the courts from the potential landslide of lawsuits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operations of delivering millions of packages and letters each year."

465 F. Supp. at 475 (citing *Birnbaum v. U.S.*, 436 F. Supp. 967, 974 (E.D.N.Y. 1977)). In essence, Congress did not intent that § 2680(b) bar all claims of negligence but, rather, all claims of negligent transmission.

Additionally, *Suchomajcz* appears to be the first Court to define "negligent transmission." 465 F. Supp. at 476, as "the alteration or injury to the package or letter while in transit." Since *Suchomajcz* did not involve negligence in the "transmission" of a package, but negligence by the Postal Service in failing to stop a package, § 2680(b) was held not to apply. 465 F. Supp. at 476-477.

In the case at bar, Petitioners are not claiming any alteration or injury to the package, containing the mail bomb, occurred while in transit. Rather, Petitioners' claim is directed specifically to the Postal Service's negligent training and supervision of its employees and agents. Accordingly, since this case does not involve the negligent transmission of the package, the lower courts have erred.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT STATED THERE WAS NOT ENOUGH EVIDENCE TO ESTABLISH A GENERAL POLICY ON BOMB DETECTION, YET DID NOT GRANT LIMITED DISCOVERY NECESSARY TO OBTAIN SAID EVIDENCE.

The Petitioners' petition for writ of certiorari should be granted because the opinion below conflicts on the issue of granting limited discovery to Petitioners. The Ninth Circuit Court of Appeals held that the Baca affidavit was insufficient to establish that there was a general Policy or regulation requiring the Postal Service to provide mail bomb detection training and supervision at all sites. Yet, the court affirmed the lower court's ruling that limited discovery is not necessary in this case. It is clear that the Ninth Circuit has acknowledged the need for Petitioners to provide more supporting evidence regarding the Postal Services policies; however, both the lower court and the Ninth Circuit Court of Appeals would not grant Petitioners the opportunity to obtain said evidence.

CONCLUSION

For the foregoing reasons, the instant Petition for a Writ of Certiorari should be granted.

Dated this 24th day of September, 1998

Respectfully submitted,

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APPENDIX

Appendix A – Opinion of the United States Court of Appeals for the Ninth Circuit Filed June 26, 1998 .....App. 1

Appendix B – Order of the United States District Court of Nevada Entered March 31, 1997 ....App. 11

Appendix C – Judgment of the United States District Court of Nevada Entered March 31, 1997 .....App. 19

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH GAGER; DEANNA GAGER, *Plaintiffs-Appellants,* v. UNITED STATES OF AMERICA, *Defendant-Appellee.*	No. 97-15710 D.C. No. CV-96-00782-PMP OPINION

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted
February 12, 1998 – San Francisco, California

Filed June 26, 1998

Before: Dorothy W. Nelson, Stephen Reinhardt, and Charles Wiggins, Circuit Judges.

Opinion by Judge Wiggins

COUNSEL

Oscar B. Goodman, Las Vegas, Nevada, for the plaintiffs-appellants.

E. Roy Hawkens, Assistant United States Attorney, Washington, D.C., for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

Kenneth and Deanna Gager sued the United States under the Federal Tort Claims Act ("FTCA") after the United States Postal Service ("Postal Service") unwittingly delivered a mail bomb to them. In their suit, the Gagers alleged negligent training and supervision of Postal Service employees. The district court dismissed the action for lack of subject matter jurisdiction. Specifically, the court held that both the postal matter exception, 28 U.S.C. § 2680(b), and the discretionary function exception, 28 U.S.C. § 2680(a), of the FTCA applied. We have jurisdiction under 28 U.S.C. § 1291, and we hold that the discretionary function exception bars the Gagers' claim. Consequently, we do not address the applicability of the postal matter exception.

BACKGROUND

On or about September 8, 1993, the United States Postal Service delivered a package addressed to Kenneth Gager, a Nevada Highway Patrol Trooper, to his residence in Minden, Nevada. The package weighed several pounds and had been heavily taped. A partial return address indicated that it was sent from Carson City, Nevada.

The package had been sent by an individual whom Mr. Gager had arrested and testified against in the performance of his law enforcement responsibilities. Unfortunately, the package was nothing more than a disguised bomb. The bomb exploded as Mr. Gager opened the

package, causing the Gagers serious injuries and damage to their home.

At the time of this mail bombing, the Postal Service did not require nationwide training in bomb detection. The personnel at the Minden Postal facility – including the carrier who delivered Mr. Gager's package – had not received any such training prior to this incident. Minden Postmaster Jose Maes instituted a training program shortly after the Gager mail bomb.

On August 29, 1996, the Gagers sued the United States under the FTCA, 28 U.S.C. §§ 1346(b), 2671-80, for negligence and loss of consortium. Specifically, the Gagers alleged that the Postal Service negligently failed to train and supervise its employees in bomb detection and disposal.

The United States moved to dismiss for lack of subject matter jurisdiction. The government claimed immunity from suit under two exceptions to the FTCA's waiver of sovereign immunity for tort claims against the United States: the postal matter exception, 28 U.S.C. § 2680(b), and the discretionary function exception, 28 U.S.C. § 2680(a). The district court granted the government's motion and held that both exceptions applied. *See Gager v. United States*, 958 F. Supp. 494 (D. Nev. 1997). In addition, the court rejected the Gagers' request to conduct limited discovery on whether the Postal Service had any policies or procedures requiring the training of Postal employees in bomb detection. *See id.* at 497. Following the dismissal of their claim, the Gagers timely appealed.

STANDARD OF REVIEW

We review de novo the district court's determination of subject matter jurisdiction. *See Blackburn v. United States*, 100 F.3d 1426, 1429 (9th Cir. 1996). We review the district court's discovery rulings for an abuse of discretion. *See id.* at 1436.

DISCUSSION

I. The Discretionary Function Exception

The FTCA, 28 U.S.C. §§ 1346(b), 2671-80, waives the government's sovereign immunity for tort claims arising out of the negligent conduct of government employees acting within the scope of their employment. *See Blackburn*, 100 F.3d at 1429. The discretionary function exception of the FTCA is a statutory reservation of sovereign immunity for a particular class of tort claims. The exception retains immunity when the claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

We follow a two-step test to assess the applicability of the discretionary function exception. First, "[t]he exception covers only acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice.' " *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). This requirement of judgment or choice is not satisfied if a federal statute, regulation, or policy requires a particular course of action. *See id.* at 322. Second, the

discretion exercised must be " 'of the kind that the discretionary function exception was designed to shield.' " *Id.* at 321-22 (quoting *Berkovitz*, 486 U.S. at 536). The judgments and choices entitled to protection are those "grounded in social, economic, and political policy." *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).

A. Judgment or Choice

The Gagers challenge the Postal Service's decision not to train and supervise Minden Postal employees in bomb detection. The Gagers concede that in the absence of any statute, regulation, or policy requiring such training, that decision plainly involves judgment or choice.

The Gagers allege, however, that there was an established policy of training and supervision in bomb detection that eliminated any possible choice involved in the Postal Service's decision. In support of this argument, the Gagers rely on the affidavit of Beth Baca, a Postal Service employee in Las Vegas. She stated that the Postal Service briefly instituted a training program in mail bomb detection following a mail bomb incident in Las Vegas in 1989 or 1990. We believe that this evidence is insufficient to establish that there was a general Postal Service policy or regulation requiring training and supervision at all sites. At most, the declaration suggests that the Postal Service instituted training only in response to a known threat. Indeed, the remainder of the record confirms that no general policy of universal training existed.

First, the relevant regulations do not require training in bomb detection. *See* United States Postal Service, *Domestic Mail Manual* (1993). Second, the government

offered the declaration of a high-ranking Postal official that confirms the absence of any such general policy: "During all times relevant to this action, no mandatory regulations, policies, or procedures existed which specifically required a course of training or instruction to be provided to all Postal employees and contractors in the detection of mail bombs or other suspicious packages." Indeed, the Baca affidavit supports the official's claim that training was restricted to "limited numbers of facilities where a cognizable threat exists." Based on this evidence, we agree with the district court that there was no policy or regulation requiring training and supervision in bomb detection in the absence of a specific threat.[1] The Gagers have not alleged that the Minden Postal employees were aware of a cognizable threat of a mail bomb prior to September 8, 1993. Accordingly, the district court's conclusion that the Postal Service's decision involved judgment or choice is also correct.

B. Grounded in Social, Economic, and Political Policy

The second inquiry in the discretionary function analysis is whether the judgment or choice was "grounded in social, economic, and political policy." *Varig Airlines*, 467 U.S. at 814. We must decide whether the Postal Service balanced competing public policy concerns in reaching its decision. We conclude that it did.

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[1] The district court denied the Gagers' request for limited discovery on this issue. We address that denial in section II, *infra*.

In deciding not to provide universal training and supervision in mail bomb detection, the Postal Service balanced many competing concerns. On the one hand, the Postal Service had to consider the safety of its employees and the public – mail bombs, while rare, cause significant personal and property damage. Obviously, it would be ideal from a public safety standpoint if the Postal Service could eliminate entirely the threat posed by mail bombs. The policy of safety weighs in favor of instituting a training and supervision program.

On the other hand, several policies pulled the Postal Service in the opposite direction. First, there are many economic concerns attendant to any training program. The Postal Service has approximately 800,000 employees and delivers about 680 million pieces of mail each day. Training and supervising Postal employees in mail bomb detection necessarily involves significant resources and time. Second, the Postal Service is required by law to provide "prompt, reliable, and efficient services." 39 U.S.C. § 101(a). A program designed to detect mail bombs would likely impact all three of these goals. Finally, the Postal Service is committed to the important policy of respecting privacy. Increased scrutiny of packages necessarily would impinge on privacy to some extent.

In light of these competing concerns, the Postal Service decided that the proper strategy was to limit training to those sites where a known threat existed. In the Postal Service's view, this limited training program represented the most effective allocation and deployment of its resources. The Postal Service "balanced competing policy considerations" in reaching this conclusion. *Blackburn,*

100 F.3d at 1434. Consequently, "[t]his decision is 'precisely the kind the discretionary function exception was intended to immunize from suit.' " *Id.* (quoting *Childers v. United States*, 40 F.3d 973, 976 (9th Cir. 1994)). We conclude that the discretionary function exception of the FTCA bars the Gagers' suit. *Cf. Hughes v. United States*, 110 F.3d 765, 768-69 (11th Cir. 1997) (finding that decisions by the Postal Service regarding security at post offices fall within the discretionary function exception of the FTCA because they involve judgment or choice grounded in social, economic, and political policy).

We are not persuaded to the contrary by the Gagers' reliance on several inapposite cases. In *Faber v. United States*, 56 F.3d 1122 (9th Cir. 1995), the government acted in direct contravention of a specifically prescribed federal policy and, therefore, the discretionary function exception was not applicable. In the case at hand, however, there was not a specific policy to provide training in bomb detection; the Postal Service's decision involved judgment or choice.

Similarly, in *Routh v. United States*, 941 F.2d 853 (9th Cir. 1991), we concluded that a contracting officer's failure to require a particular piece of safety equipment on a contractor's machinery was not a discretionary function shielded from tort liability because the choice did not involve a policy decision. The contracting officer's decision was an isolated one that did not implicate any broad public policy concerns. In our case, however, the Postal Service's decision was clearly rooted in social, economic, and political policy, thereby invoking the discretionary function exception.

In sum, we agree with the district court that the Gagers' suit against the United States is barred by the discretionary function exception of the FTCA. The decision not to provide universal training and supervision in mail bomb detection involved judgment or choice grounded in social, economic, and political policy. *See Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). While we sympathize with the Gagers, we are not able to expand the narrow areas in which the United States has waived sovereign immunity.

II. The Gagers' Request for Limited Discovery

The Gagers also challenge the district court's denial of their request to conduct limited discovery on the issue of whether a specific policy existed requiring the training of all Postal employees. As noted above, the existence of a specific policy could influence the application of the discretionary function exception.

After filing their complaint, the Gagers engaged in discovery, obtaining several affidavits that presented in detail the existing training methods and policies of the Postal Service for the Nevada region. The government also submitted a declaration detailing the Postal Service's general policies. Together, this information described the training, or lack of training, in mail bomb detection that the Postal Service provided to the Postal worker who delivered the mail bomb package to the Gagers, set forth in detail the Postal Service's training policies regarding mail bomb detection, and explained the rationale underlying the Postmaster's decision not to implement a mandatory training policy in the absence of a known threat.

It is well-established that " '[t]he burden is on the party seeking to conduct additional discovery to put forth sufficient facts to show that the evidence sought exists.' " *Conkle v. Jeong*, 73 F.3d 909, 914 (9th Cir. 1995) (quoting *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987)). The Gagers have not met this burden. The evidence previously obtained during discovery demonstrated that the Postal Service did not have a mandatory training policy except in particular areas where a specific threat existed. It is very unlikely that additional discovery would have produced contrary facts – i.e., evidence of a different policy. We also note that the Gagers have not specified in any way where such additional evidentiary material might be found. In the absence of a more substantial showing that contradictory evidence exists, we conclude that the Gagers have not shown that additional discovery is appropriate. Accordingly, we affirm the district court's denial of their discovery request.

CONCLUSION

We agree with the district court that the discretionary function exception of the FTCA bars the Gagers' claim against the United States for negligent training and supervision of Postal Service employees. We also affirm the district court's denial of the Gagers' request to conduct limited discovery.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

KENNETH R. GAGER and DEANNA A. GAGER, Plaintiffs, v. UNITED STATES OF AMERICA Defendant.	CV-S-96-0782-PMP (RLH) ORDER (Filed Mar. 20, 1997)

Presently before the Court is Defendant United States of America's ("United States") Motion to Dismiss for Lack of Subject Matter Jurisdiction (# 4) filed on November 26, 1996. Plaintiffs Kenneth R. Gager and Deanna A. Gager ("the Gagers") filed an Opposition (# 8) on January 13, 1997. Plaintiffs also filed a Supplement to their Opposition (# 10) on February 20, 1997. On January 31, 1997, the United States filed a Reply (# 9).

I. Factual Background

In September of 1993, the United States Postal Service ("Postal Service") delivered a package to Kenneth Gager through the regular course of United States mail delivery. The package contained a mail bomb that exploded when Kenneth Gager opened the package. Kenneth Gager's wife, Deanna Gager, was present when the package was opened, and witnessed the explosion. As a result of the

explosion, Kenneth Gager received permanent and disabling injuries. The Gager residence was severely damaged as well.[1] On August 29, 1996, the Gagers filed suit against the United States under the Federal Tort Claims Act ("FTCA") for negligence and loss of consortium.

II. Procedure

The United States alleges immunity from suit under two exceptions to the FTCA's waiver of sovereign immunity for tort claims against the United States. The first exception is the postal matter exception, 28 U.S.C. § 2680(b), the second exception is the discretionary function exception, 28 U.S.C. § 2680(a). The United States brings its Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. In deciding a 12(b)(1) motion, a court must read the Complaint in a light most favorable to the Plaintiff and accept all factual allegations as true. *United States v. Gaubert*, 499 U.S. 315, 327 (1991). The plaintiff has the burden of establishing subject matter jurisdiction. *Robinson v. United States of America*, 849 F.Supp. 799, 800-01 (S.D.Ga.1994).

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[1] The individuals responsible for this heinous crime have been criminally prosecuted by the United States and convicted by juries before the Honorable David W. Hagen, United States District Judge, District of Nevada, in *U.S. v. Abrom Sander Finkel*, Case No. CR-N-94-001-DWH, and *U.S. v. Robert John Collins*, Case No. CR-N-95-035-DWH.

In their Opposition (# 8), the Gagers move to allow limited discovery and to amend their Complaint. As discussed *infra*, the motion for discovery is denied. A Plaintiff may amend his or her Complaint once as a matter of course before a responsive pleading is served. Accordingly, the United States treats the Amended Complaint as if it had been filed, and has renewed its Motion to Dismiss.

III. Postal Matter Exception, 28 U.S.C. § 2680(b)

The FTCA provides that the United States is immune for "any claim arising out of the loss, miscarriage or negligent transmission of letters or postal matter." The plain language of the FTCA thus bars the Gager's suit. *See Robinson*, 849 F.Supp. at 803. In *Robinson*, the Plaintiffs alleged that the Postal Service negligently failed to reject a non-mailable, dangerous package which killed the recipient, Robert Robinson. *Id.* at 800. The court found that both the postal matter and discretionary function exceptions to the FTCA barred the Plaintiffs' suit. *Id.* at 806.

To avoid this outcome, the Gagers argue that they are not alleging negligence arising out of the transmission of postal matter. Rather, they claim that the Postal Service failed to properly train employees[2] *before* the package

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[2] Leanne Mary Emm, the person who delivered the package to the Gagers, was not a postal employee. Her mother, Vicki Hovey, was a Highway Contract Rep., and Ms. Emm "worked" for her mother. (Dec. of Donald Dibble, Plaintiff's Opposition Attach. p. 20).

arrived at the post office. This distinction is without merit. The language of the exception, "any claim arising out of . . . the negligent transmission" is expansive. It encompasses the Gager's claims for failure to train, since the Gager's damages arise out of the transmission of the package to their home. It is the transmission of the package that actually caused the Gager's injuries. They were not harmed by the failure to train in and of itself, but rather the delivery and process of opening the package. Therefore, the exception covers the negligence that the Gager's allege in their complaint, and the government is immune from suit.

The postal matters exception to the FTCA was designed to ensure that certain government actions were not disrupted by the threat of damage suits, and to avoid the United States' exposure to excessive or fraudulent claims. *Id.* at 802. Accepting the Gager's interpretation of the postal matters exception would eviscerate this exception to the FTCA. Any plaintiff could allege that their claim arose not out of the *transmission* of postal matter, but out of actions occurring before the actual receipt of an item at a postal facility or after its delivery. In light of the broad language of the exception, such claims would be merely end-runs around the intent clearly expressed by Congress in enacting 28 U.S.C. § 2680(b).

IV. Discretionary Function Exception

Section 2680(a) of the FTCA provides that the United States is immune from any claim based on an act or omission of an employee of the United States involving the exercise or performance of a discretionary function.

28 U.S.C. § 2680(a).[3] A court must first examine whether the act involves an element of judgment or choice, then determine whether the judgment is the type that the exception was designed to protect. *Gaubert*, 499 U.S. at 322-23.

A. Whether the Training of Postal Employees Involves a Judgment or Choice.

The training of postal employees in the detection of mail bombs is a judgment and choice on the part of postal officials. The Postal Service's policy is to plan and develop adequate and efficient postal services at fair and reasonable prices. 39 U.S.C. § 404(a). The exceptions to the FTCA, particularly the postal matters exception, are designed to allow the Postal Service to implement regulations and policies by balancing speed, costs, privacy and security. To individually examine the billions of pieces of mail handled by the Postal Service would involve significantly increased costs and delays in mail service. 55 Fed.Reg. At 29,638. The Postal Service therefore has discretion to formulate security measures and training methods which strike what it deems the proper balance of these competing values.

Robert D. Northrop, Acting Program Manager for the Fraud and Prohibited Mailings Group for the Postal

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[3] The discretionary function exception was first discussed by the Supreme Court in *Dalehite v. U.S.*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), where the exception barred recovery for claims arising from a massive explosion of fertilizer produced as part of a post-World War II relief program. *U.S. v. Gaubert*, 499 U.S. 315, 323, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991).

Inspection Service, stated in his affidavit that during the time relevant to this action, there were no mandatory regulations, policies or procedures existing which specifically required training or instruction for all postal employees and contractors in the detection of mail bombs or other suspicious packages. (Dec. of Robert D. Northrop, Defendant's Reply (# 9), Attach. p. 1). As there were no mandatory regulations or procedures, training employees in these areas was a discretionary act by postal officials. It was, in short, a judgment call of the United States Government in balancing safety and cost in light of the Postal Service's limited resources. Northrop stated that the balance struck meant that training was conducted for specific areas at facilities where a cognizable threat existed. The decision not to train workers in the Minden area was an act of discretion by the United States that cannot form the basis of a claim under the FTCA.

The Gagers offer affidavits in their supplemental Opposition (# 10) from a postal worker in Las Vegas who states that in 1989 or 1990 a mail bomb killed a woman in the Las Vegas area. In response, Las Vegas postal workers were trained and sent safety pamphlets concerning the detection of mail bombs. The Gagers also allege that the entire State of Nevada is in the Las Vegas Postal District. These facts are insufficient to establish that a mandatory regulation existed either statewide or in Minden, Nevada, which required the training of postal workers in identifying dangerous packages. Robert Northrop avers that the only regulation that existed required the training of employees at facilities where a cognizable threat existed. The Gagers have made no showing that the Minden area was such a facility, and therefore they have failed to show

that the lack of training was a mandatory, rather than a discretionary function.

The Gagers also request that discovery be allowed so that they can determine if a specific policy existed requiring the training of postal employees. They have offered no proof of any such mandatory regulation and admit that they are not cognizant of whether any policy existed. Plaintiffs have offered no published postal regulation or manual setting forth such a policy. They have offered no affidavit from any postal worker or official stating that such a regulation existed. Furthermore, even if the Gagers sufficiently proved that a mandatory regulation existed and that the United States violated that policy, the United States would still be immune from suit under the postal matters exception to the FTCA. Therefore, this Court denies the Gager's request to allow limited discovery.

B. Whether the Judgment is the Type that the Discretionary Function Exception is Designed to Protect.

The balance of safety, privacy, cost and efficiency discussed above is clearly the type of policy decision the discretionary function exception to the FTCA is designed to protect. The exception was designed to avoid judicial second guessing of administrative decisions grounded in social and economic policy. *Gaubert*, 499 U.S. at 332. When regulations allow a United States agency to exercise discretion, it must be "presumed that the agent's acts are grounded in policy when exercising that discretion." *Id.* at 324, 111 S.Ct. at 1274. As the discretion to balance

issues involving the inspection of packages and training of employees is necessary to provide efficient and effective postal services, it is the very type of discretion the discretionary function was designed to shield. *Robinson*, 849 F.Supp. at 806. Therefore, the discretionary function exception applies in this case and bars the Gager's claim.

This Court is aware of the seriousness of the Gager's injuries and the grave safety concerns surrounding dangerous packages transported through the United States Postal Service. The Gagers, just as anyone else whose claims are barred by the discretionary function exception, will be understandably dissatisfied and frustrated with the result. Furthermore, the Gagers may find little solace, and even less compensation, for their pain and injuries by the fact that the individuals responsible for the heinous mail bomb attack on them have been sentenced to prison and may be subject to personal liability to the Gagers as a result of their conduct. However, as a Court of limited jurisdiction, this Court is bound by the narrow areas in which the United States has consented to waive sovereign immunity.

IT IS THEREFORE ORDERED THAT Defendant's Motion to Dismiss (# 4) is GRANTED.

DATED: March 27, 1997

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

***** DISTRICT OF NEVADA

JUDGMENT IN A CIVIL CASE

KENNETH R. GAGER and
DEANNA A. GAGER,

Plaintiffs,

V.

CV-S-96-782-PMP
(RLH)

UNITED STATES OF AMERICA,

Defendant.

(Filed Mar. 31, 1997)

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's [sic] verdict.

X **Decision by Court.** This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Defendant's Motion to Dismiss the complaint is GRANTED.

JUDGMENT IS HEREBY ENTERED in favor of Defendant and against Plaintiffs.

March 31, 1997
Date

LANCE S. WILSON
Clerk

/s/ Illegible
(By) Deputy Clerk

APPENDIX D

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KENNETH R. GAGER and DEANNA A. GAGER, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	CASE NO. CV-S-00782-PMP (RLH) AMENDED COMPLAINT FOR DAMAGES: DEMAND FOR JURY TRIAL

COME NOW plaintiffs, Kenneth R. Gager and Deanna A. Gager, by and through their attorneys of record, Goodman, Chesnoff & Keach, and hereby state as follows:

1. This action arises under the Federal Tort Claims Act, 28 U.S.C. §§2671, *et seq*. This Court is vested with jurisdiction pursuant to 28 U.S.C. §1346(b).

2. Plaintiffs Kenneth R. Gager and Deanna A. Gager are husband and wife and, at all times relevant herein, resided in Minden, Douglas County, Nevada, which falls within the United States District Court for the District of Nevada and are thus within the jurisdiction of this Court.

3. United States Postal Service is a federal agency of defendant United States of America and was, and now is, responsible for providing mail service to plaintiffs at their residence.

4. On or about September 7 or 8, 1993, a package was delivered to plaintiffs at their residence through the regular course of delivery by the United States Postal Service. This package was addressed to plaintiff Kenneth R. Gager and delivered to him by the U.S. Postal Service by and through its agents, servants and/or employees acting in and during the course of their regular course and scope of employment and/or agency with the United States Postal Service.

5. As it turns out, this package was a mail bomb.

6. On or about September 8, 1993, plaintiffs Kenneth and Deanna Gager were at their home together when plaintiff Kenneth Gager proceeded to open the package. When he did, the package (mail bomb) exploded causing the serious, permanent and disabling injuries described hereinbelow, as well as severely damaging the Gager residence, all of which was witnessed and experienced by

plaintiff Deanna Gager and which caused injuries to her as well.

7. At all times herein mentioned, United States Postal Service, a federal agency of defendant had a duty to properly train and supervise its agents, servants and/or employees in the recognition of risks of harm that were reasonably foreseeable to those members of the public being served by the United States Postal Service and to exercise reasonable care in dealing with these conditions. All of the acts or omissions complained of were performed by the agents, servants or employees of defendant, while acting within the scope of their agency and/or employment, and with the permission and consent of defendant.

8. The injuries to plaintiffs were directly and proximately caused by the negligence of defendant and the United States Postal Service in that they carelessly, wrongfully and negligently:

A. Failed to properly train and supervise those Postal Service agents, employees and/or representatives who were involved in the delivery of the mail bomb to plaintiffs in the detection of mail bombs and/or other suspicious packages, and in the proper steps to take in the event a mail bomb or suspicious package was detected, even though there was a statute, regulation or policy to do so.

B. Failed to properly supervise those Postal Service agents, employees and/or representatives involved in the delivery of the mail bomb to plaintiffs to ensure that they were taking the necessary steps to detect mail

bombs and/or suspicious packages, even though there was a statute, regulation or policy to do so.

C. Failed to ensure those Postal Service employees responsible for training the Postal Service agents, employees and/or representatives involved in the handling of the mail bomb which was delivered to plaintiffs were taking the necessary steps to properly train and supervise those agents, employees and/or representatives in the detection of mail bombs and/or other suspicious packages and in the proper steps to take in the event a mail bomb or other suspicious package was detected, even though there was a statute, regulation or policy to do so.

D. Failed to take the proper, necessary and reasonable precautions to detect mail bombs before allowing them to be delivered to members of the public, such as plaintiffs, including, but not limited to, providing some sort of x-ray type screening, such as in common use in airports, federal courthouses and other public buildings for the detection of firearms and explosives, even though there was a statute, regulation or policy to do so.

E. Accepted a package for delivery, i.e., the mail bomb delivered to plaintiffs herein, which was nonmailable under the regulations of defendant and its agency, United States Postal Service, even though there was a statute, regulation, or policy to do so.

FIRST CLAIM FOR RELIEF

(Negligence of Behalf of Kenneth Gager)

9. Plaintiffs replead and reallege each and every allegation contained in paragraphs 1 through 8 as if fully set forth herein at length.

10. Defendant and its agency, United States Postal Service, owed a duty to plaintiffs, which duty was breached as set forth hereinabove, thereby causing the injuries and damages to plaintiff as herein alleged.

11. As a direct and proximate result of defendant's negligence as herein alleged, plaintiff Kenneth Gager was injured in and about his head, neck, back, body, limbs, organs and nervous system and was otherwise injured and caused to suffer great pain of body and mind, all of which conditions are permanent and disabling in nature, all of which have caused him to suffer physical and emotional injuries and a loss of enjoyment of life, all to his general damage in an amount in excess of $20,000,00.00.

12. As a further and direct and proximate result of defendant's negligence as herein alleged, plaintiff Kenneth Gager has incurred expenses for medical care and treatment and expenses incidental thereto, and, plaintiff is informed and believed and thereon alleges that such expenses will continue in the future, all to his damage and in the amount of $1,787,576.00, with the exact amount to be established at trial.

13. At the time of the incident described herein, plaintiff Kenneth Gager was a well and able-bodied man, and gainfully employed; as a direct and proximate result

of the negligence of defendant as herein alleged, plaintiff Kenneth Gager was unable to work which has resulted in a loss of earnings and earning capacity for him, both in the past and in the future in the amount of $2,024,021.00.

14. As a further direct and proximate result of the negligence of defendant, plaintiff Kenneth Gager has suffered property damage to his residence and incurred additional living expenses; plaintiff is informed and believes and thereon alleges that such property damages was in the amount of $71,709.80, and that the additional living expenses will total an amount of $900,000.00.

15. It has become necessary for plaintiff Kenneth Gager to retain the services of an attorney to prosecute this action, and plaintiff is therefore entitled to attorney's fees and costs of suit.

SECOND CLAIM FOR RELIEF

(Loss of Consortium)

16. Plaintiffs replead and reallege each and every allegation contained in paragraphs 1 through 15 as though fully set forth herein at length.

17. As a direct and proximate result of the negligence of defendant and its agency, United States Postal Service, as set forth hereinabove, plaintiff Deanna Gager was caused to suffer a loss of her husband's services, his companionship, society, comfort and consortium, and expenses associated therewith, resulting in general and special damages in an amount in excess of $5,000,000.00.

18. It has become necessary for plaintiff Deanna Gager to retain the services of an attorney to prosecute

this action, and plaintiff is therefore entitled to attorney's fees and costs of suit.

THIRD CLAIM FOR RELIEF

(Negligence on Behalf of Deanna Gager)

19. Plaintiffs replead and reallege and each and every allegation contained in paragraphs 1 through 18 as though fully set forth herein at length.

20. The conduct of defendant and its agency, United States Postal Service, as set forth hereinabove was negligent and/or extreme and outrageous in that the witnessing by plaintiff Deanna Gager of this incident and the injuries suffered by her husband and damage caused to her home, and the fact that she was thrown across the kitchen when the bomb exploded, has caused severe emotional distress and other physical injuries.

21. As a direct and proximate result of the actions, conduct and breaches of duty of defendant and its agency, United States Postal Service, as herein alleged, plaintiff Deanna Gager has suffered physical and emotional injuries and a loss of enjoyment of her life and was otherwise injured and caused to suffer great pain of body and mind, all of which conditions may be permanent and disabling in nature, all to her general damage in the amount of $10,000,000.00.

22. As a further and direct and proximate result of defendant's negligence as herein alleged, plaintiff Deanna Gager has incurred expenses for medical care and treatment and expenses incidental thereto, all to her damage in a sum according to proof at trial. Plaintiff is informed

and believes and thereon alleges that such expenses will continue in the future, all to her damage and in a presently unascertainable amount, and in this regard, plaintiff prays leave of court to insert all damages herein when same have been fully ascertained.

23. At the time of the incident described here in, plaintiff Deanna Gager was a well and able-bodied woman, and gainfully employed; as a direct and proximate result of the negligence of defendant as herein alleged, plaintiff Deanna Gager was unable to work which has resulted in a loss of earnings and earning capacity for her in the amount of $25,560.00.

24. It has become necessary for plaintiff Deanna Gager to retain the services of an attorney to prosecute this action, and plaintiff is therefore entitled to attorney's fees and costs of suit.

SUBMISSION UNDER THE FEDERAL TORT CLAIMS ACT

25. On or about September 6, 1995, plaintiff Kenneth Gager submitted a claim based on the allegations contained herein in the amount of $24,783,307.19 to the United States Postal Service in accordance with the Federal Tort Claims Act.

26. On or about March 7, 1996, the claim of Kenneth R. Gager was rejected by the United States Postal Service by correspondence – dated March 7, 1996 to plaintiffs' counsel and signed by Attorney David P. Buck on behalf of United States Postal Service.

27. On or about September 6, 1995, plaintiff Deanna Gager submitted a claim based on the allegations contained herein in the amount of $10,097,269.80 to the United States Postal Service in accordance with the Federal Tort Claims Act.

28. By March 8, 1996, a date at least six months after the submission of the claim of Deanna Gager, the United States Postal Service had neither accepted nor rejected her claim and, pursuant to 28 U.S.C. §2675(a), plaintiff elects to consider the failure to act as a final denial of the claim.

WHEREFORE, plaintiffs, and each of them, pray and request judgment against defendant as follows:

1. First Claim for Relief:

   A. For medical special damages in the amount of $1,787,576.00;

   B. For loss of income and loss of future income in the amount of $2,024,021.00;

   C. For property damage to his residence in the amount of $71,709.80;

   D. For future living expenses in the amount of $900,000.00;

   E. For past and future pain and suffering in the amount of $20,000,000.00;

   F. For attorney's fees and costs of suit herein; and

   G. For such other and further relief as the Court may deem just and proper.

2. For the Second Claim for Relief:

A. For loss of consortium in the amount of $5,000,000.00;

B. For attorney's fees and costs of suit herein; and

C. For such other and further relief as the Court may deem just and proper.

2. [sic] For the Third Claim for Relief:

A. For medical special damages in an amount to be shown at trial;

B. For loss of income in the amount of $25,560.00;

C. For past and future pain and suffering in the amount of $10,000,000.00;

D. For attorney's fees and costs of suit herein; and

E. For such other and further relief as the Court may deem just and proper.

DATED this 13th day of January, 1997.

GOODMAN, CHESNOFF & KEACH

/s/ _____

Oscar B. Goodman Bar No. 2368
520 South Fourth Street
Las Vegas, NV 89101
Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs herein hereby demand a trial by jury on all issued [sic] raised by the Complaint herein. DATED this 13th day of January, 1997.

GOODMAN, CHESNOFF & KEACH

/s/ _____

Oscar B. Goodman Bar No. 2368
520 South Fourth Street
Las Vegas, NV 89101
Attrorneys for Plaintiffs

APPENDIX E

AFFIDAVIT OF DONALD R. DIBBLE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

DONALD R. DIBBLE, being first duly sworn, deposes and says:

1. I am a professional investigator employed by the law firm of Goodman, Chesnoff & Keach to investigate the above-captioned matter and to interview a potential witness.

2. I interviewed Leanne Mary Emm on September 1, 1994 in Minden, Nevada at 5:45 p.m.

3. The interview was in reference to Mrs. Emm's employment as a mail carrier and regarding the mail bomb incident with Kenneth Gager on September 8, 1993.

4. Mrs. Emm explained to me that she is not a "direct employee" of the U.S. Postal Service but, instead, a Highway Contract Rep. ("HCR").

5. Mrs. Emm has a contract with the Post Office. She delivers the mail and has the "same responsibilities as a postal employee would have" but does not "carry the postal employee name."

6. Mrs. Emm is not contracted to merely do "over-flow" work, but has her own designated area that she delivers mail to every day. Mrs. Emm stated the Post Office hires her (and others similar to her) because "it's cheaper."

7. Mrs. Emm's contract is held by her mother, Vicki Hovey. Mrs. Hovey has held this contract with the Post Office for approximately eight years. Since Mrs. Hovey holds the contract, Mrs. Emm "works" for her.

8. Six days a week, Mrs. Emm goes to the Minden Post Office at 7:30 a.m. She reports to the Minden Postmaster, Jose Maes. Also, at the Minden Post Office, there are only three mail carriers. Only one is a direct employee of the U.S. Postal Service. Mrs. Emm and her husband are both contract workers.

9. Mrs. Emm carries an identification card, which states: "non-postal" on it. However, Mrs. Emm does believe the card has the appearance of an official sanction as an affiliate to the U.S. Postal Service.

10. When starting her position, Mrs. Emm was only trained by her mother (Vicki Hovey), who herself was never trained by the Post Office or any branch of the U.S. Postal Service. Mrs. Emm stated her mother was trained from the "contractor before her" for only a total of six hours. Additionally, Mrs. Emm believes that her mother is in possession of manuals, which deal with numerous postal duties, including safety procedures. However, Mrs. Emm stated that she has never seen these manuals.

11. During the term of the contract, Mrs. Emm stated the post office has the right to cancel the contract at any time if they can show probable cause that the contractor is not doing their job correctly.

12. During post office hours, Mrs. Emm stated HCR contractors are treated like employees of the post office. They "have the run of everywhere."

13. Mrs. Emm stated in reference to day-to-day operations, she does not receive any guidance or direction from the postmaster, even on "new procedures."

14. Mrs. Emm stated that she recalled delivering the package (containing the mail bomb) to the Gager mail box on September 6, 1993. She further stated that she, after the package exploded, described, in detail to the police, what the package looked like.

15. Mrs. Emm stated that the package appeared to be the size of a shoe box. The package was wrapped in brown bag wrap with tape and a white piece of paper, with "K. Gager" and his address typed on the paper then taped on top of the box. Mrs. Emm also recalled that no return address was on the box.

16. On the night of September 8, 1993, the day the package exploded in Mr. Gager's home, Mrs. Emm was contacted by the police and visited at her home by Mr. Jose Maes, the Minden Postmaster. He questioned her about whether she delivered the package. Also, at that point, Mr. Maes recommended that they call the postal inspector and go to the scene.

17. Within one week after the package exploded, Mrs. Emm stated that the Minden Post Office held a meeting to discuss "what to look for in a bomb package." The meeting lasted approximately five to six minutes. In the meeting, they talked about what to look for when delivering packages. Mr. Maes told her to look for heaviness, weight, perfection and no errors in the address, excess postage, whether the address was typed or hand written and excess tape.

18. Mrs. Emm stated that the meeting only lasted five to six minutes because she got angry, started to cry and left. She became angry because they (post office) had never told her about any of these techniques in bomb detection. Mrs. Emm stated that had she received this training before delivering the mail bomb to the Gager residence, she would have been suspicious of the package and taken the necessary steps to insure it wasn't a bomb before delivering it.

19. The meeting was held by the Postmaster. The Postmaster, during the meeting was reading from "a piece of paper." Mrs. Emm had no idea what the paper was, where it came from or whether it was some type of bulletin.

20. Mrs. Emm got the impression that the instructions the Postmaster was reading appeared to be "accumulated knowledge" of many people in the postal service.

21. Mrs. Emm stated that the meeting was called a "stand up." Though not scheduled, this was usually held about once a month. The meeting was usually about safety, such as wearing seat belts and safe driving methods.

22. Mrs. Emm stated that although contract employees are not required to attend these meetings, the Postmaster has on occasion called the contract employees into these meetings. They usually talk about procedures and safety.

23. Prior to the package exploding at the Gager residence, Mrs. Emm stated that in the seven years she

has worked as a postal contractor, she has never been explained the issue of "dangerous packages that could harm either postal employees or the public at large." She was never given any bulletin, newsletter or any verbal instruction to the same.

24. Mrs. Emm stated that once an actual "rural route employee" (direct employee of U.S. Postal Service) is hired, they are sent to training prior to starting work. Mrs. Emm has never been sent to this training. or any training prior to delivering mail.

25. Mrs. Emm stated that she can and does get disciplined by the U.S. Postal Service. She stated that she had been "written up" for numerous things including; losing certified letters, not keeping a spare tire in the car nor a fire extinguisher in the car. Mrs. Emm stated that the U.S. Postal Service has the authority to require her to keep certain equipment in her car like flares, flashes, spare fuses, spare tires and seat belts.

26. I further had an opportunity to discuss this matter with both Ken and Deanna Gager, who have advised me of the following:

A. Ken Gager advised me that he recalled the package appearing to be the size of a shoebox. The package was a brownish color, like a brown wrapping paper. The package had a typed white label, with his name and address. He recalled a partial return address, which appeared to be torn off. The remaining portion had Carson City, Nevada. The package was secured with heavy wrapping tape. He had to use a knife to open it.

B. Deanne Gager advised me that on September 8, 1993 she went to their cluster box to retrieve the mail. After opening the box, along with a letter addressed to her husband, Kenneth Gager, from their son, Clint Gager, she also found a key which opens the larger postal box. The mail carrier will put a key in the mail box which opens a larger box, if some sort of package is to [sic] large for their normal box. When she opened the box, she found a package. When she first pulled out the package, her first immediate reaction was that is was extremely heavy. The size of the package was approximately twelve inches wide by twelve inches deep and six inches high. The package was in a cardboard color. The package was addressed to her husband, Ken Gager. It had their correct home address. The address was typed on a white label, stuck in the middle of the top of the package. Also on the same label, was typed on the top of the label, "Carson City, Nevada." There may have been a return address at one time, but it appeared to be torn or ripped off. The second thing that immediately drew her attention was the postage. The reason for noticing the postage was because of the weight of the package. The package was so heavy that she figured it must have cost a lot of money to mail. The postage was in the form of stamps. The amount of each stamp was one dollar. She believes there was at least seven stamps pasted on the top. When she started walking toward the house, on the right-hand side of the lid to the package, she noticed a separation between the lid and the side of the box. The package was wrapped with about a three-inch-wide strapping tape that was wrapped around the box numerous times. There was so much tape, that it drew her attention.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Donald R. Dibble
DONALD R. DIBBLE

Subscribed and sworn to before me this

13 day of January, 1997

/s/ Karen A. Kilmartin
Notary Public

[SEAL]
NOTARY PUBLIC
STATE OF NEVADA
County of Clark
KAREN A. KILMARTIN
My Appointment Expires Oct. 18, 1997

APPENDIX F

LAW OFFICES
GOODMAN, CHESNOFF & KEACH
AN ASSOCIATION OF PROFESSIONAL
CORPORATIONS
520 SOUTH FOURTH STREET
LAS VEGAS, NEVADA 89101-6593
AREA CODE 702 - 384-5563

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KENNETH R. GAGER and DEANNA A. GAGER, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	CASE NO. CV-S-00782-PMP (RLH)

AFFIDAVIT OF BETH L. BACA

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

COMES NOW, BETH L. BACA, being first duly sworn deposes and says:

1. I am a resident of Las Vegas, Nevada and am currently employed by the United States Postal Service as a counter clerk at the Huntridge Post Office in Las Vegas, Nevada;

2. I have been employed with the Postal Service for approximately 15 years, initially being hired in approximately May, 1982, and have been continuously employed with the postal Service since that time.

3. I have been employed as a counter clerk since approximately 1988. Prior to that time, I was assigned to distribution.

4. In approximately 1989 or 1990, I had an occasion to accept a package for mailing over the counter from a man from Grants, New Mexico. As it turns out, this package was a mail bomb that resulted in the death of a woman.

5. Prior to the mail bomb incident in 1989 or 1990, referred to above, I had received no training as to how to identify mail bombs or what steps to take in the event a mail bomb was suspected.

6. Subsequent to that incident, and for a several month period after that incident, the Postal Service implemented a policy about training people in regards to the detection of mail bombs and steps to take in the event a mail bomb was suspected. The Postal Service sent pamphlets to the Supervisors to have safety "stand ups" done with window clerks and carriers. A stand up is where the Supervisors would put the clerks and carriers together and go over the pamphlets that had been sent out which showed what to look for in the detection of mail bombs.

7. In our office, as Clerks, we have stand ups every Friday dealing with various issues. The first stand up following my becoming aware that the mail bomb had been sent through out office was when the Supervisors called us together and went over a pamphlet concerning the detection of mail bombs that the Supervisor had received either from the Postal Inspectors or the main post office. This first pamphlet was white, approximately two pages long, and was itemized listing various things to look for in the detection of mail bombs. As best I can recall, this pamphlet was distributed out of the main office for the United States Postal Service. This pamphlet looked like something that had come out of the Postal Inspectors office or out of some book that they had on file. It would be fair to characterize the information contained in the pamphlets as containing information the Postal Service had obtained about mail bombs over the years, containing the details of what to look for and what not to look for.

8. Following the initial stand up where the pamphlet was distributed and discussed by the Supervisor concerning the detection of mail bombs, in the following weekly stand ups, about once every three months for six or seven months the stand up would deal with a discussion of mail bombs, what to look out for, how to detect them and issues regarding mail bombs that we were being trained during these sessions.

9. It was about that time, approximately six years ago, that the Postal Service had placed written material on the wall in the Post Office concerning the detection of mail bombs.

10. Since that time in 1989 or 1990 when we were trained over the course of the several months concerning the detection of mail bombs as I have outlined above, there has been little, if no, additional training during these stand ups concerning the detection of mail bombs.

Further, affiant sayeth naught.

/s/ Beth L. Baca
BETH L. BACA

Subscribed and Sworn to before me
this 17 day of February, 1997.

/s/ Donald R. Dibble
NOTARY PUBLIC in and for said
County of Clark

[SEAL]
DONALD R. DIBBLE
NOTARY PUBLIC-NEVADA
COUNTY OF CLARK
My appt. expires Dec. 21, 1997

APPENDIX G

LAW OFFICES
GOODMAN, CHESNOFF & KEACH
AN ASSOCIATION OF PROFESSIONAL
CORPORATIONS
520 SOUTH FOURTH STREET
LAS VEGAS, NEVADA 89101-6593
AREA CODE 702 - 384-5563

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KENNETH R. GAGER and DEANNA A. GAGER, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	CASE NO. CV-S-00782-PMP (RLH)

AFFIDAVIT OF ECKLEY M. KEACH

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

COMES NOW, ECKLEY M. KEACH, being first duly sworn deposes and says:

1. I am an attorney licensed in the State of Nevada and in that regard have been retained by Plaintiffs to represent them in the above-captioned matter;

2. On Thursday, February 13, 1997, I spoke with Cliff Rucker at 361-9200 who identified himself as the postmaster for the City of Las Vegas;

3. Mr. Rucker advised me that the entire State of Nevada comprises the postal service district known as District of Las Vegas. Mr. Rucker advised me the District Manager for the District of Las Vegas, which includes all of the State of Nevada is Mike Dornbush. He further advised Mr. Dornbush's office is on Sunset Road in Las Vegas, Nevada, even though he is the District Manager for the entire district of Las Vegas, which encompasses the entire State.

Further, affiant sayeth naught.

/s/ Eckley M. Keach
ECKLEY M. KEACH

Subscribed and Sworn to before me
this 18 day of February, 1997.

/s/ Karen A. Kilmartin
NOTARY PUBLIC in and for said
County of Clark

[SEAL]
NOTARY PUBLIC
STATE OF NEVADA
County of Clark
KAREN A. KILMARTIN
My Appointment Expires Oct. 18, 1987

APPENDIX H

[LOGO]

UNITED STATES POSTAL INSPECTION SERVICE

OFFICE OF THE CHIEF INSPECTOR

January 23, 1997

ALL POSTMASTERS AND INSTALLATION HEADS

SUBJECT: Mail Bomb Security

In light of the recent wave of letter bombs experienced in Washington, DC, New York City, and Leavenworth, Kansas, postal employees understandably may be somewhat uneasy about the possibility of handling a mail bomb.

It is extremely important that employees receive every assurance from their leadership that the Postal Service is working on many fronts to ensure their safety.

Postal Bulletin 21838 (1-30-87) will feature a message on page 3 for all employees that outlines facts about mail bombs and what employes can do if they detect a suspicious parcel or letter. The Postal Bulletin will include a black-and-white version of Poster 26, *Mail Bomb Indicators*. Please ensure that all employees hear this message from their supervisor or manager.

Publication 159-C, *Contingency Planning for Bombs and Bomb Threats*, outlines your responsibilities as a postal manager in being prepared to handle bomb threat emergencies. This publication, sent to all postal facilities in July 1996 as restricted information, is available from the Material Distribution Center. A minor revision appeared in Postal Bulletin 21936 (1-2-87).

As you review Publication 159-C, pay particular attention to Section 33, Preparing Employees. Ensure that all managers and supervisors in your facility are familiar with contingency plans and evacuation procedures.

Poster 26, *Mail Bombs Indicators,* Notice 71, *Bombs By Mail,* and Pub 54, *Bomb Threat Card,* are also available from the MDC to assist you.

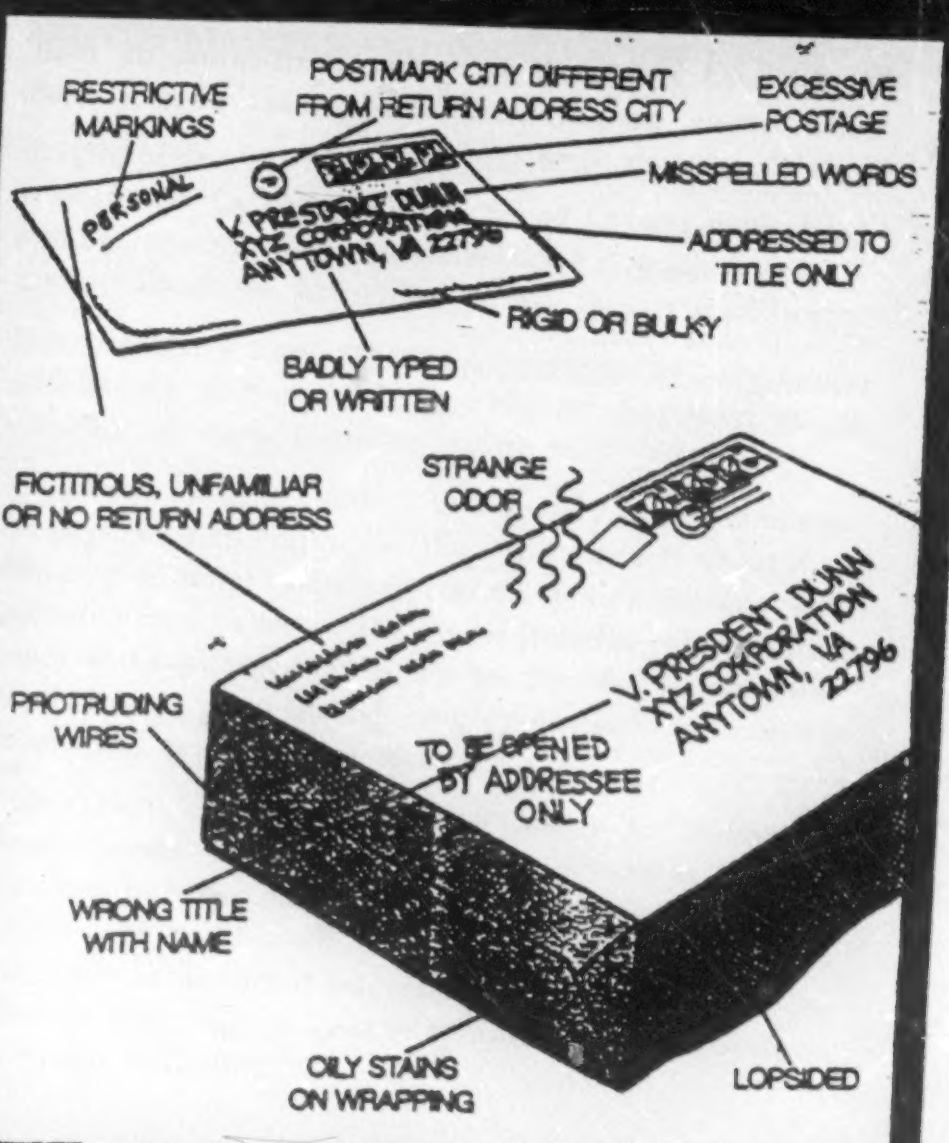
If you need assistance or further clarification on mail bomb issues, do not hesitate to contact your nearest Postal Inspection Service office.

/s/ K. J. Hunter
K. J. Hunter

475 L'Enfant Plaza SW
Washington DC 20260-2100
Fax: 202-268-4563

LETTER AND PACKAGE BOMB INDICATORS

- DO NOT OPEN
- TREAT IT AS SUSPECT
- ISOLATE IT
- CALL YOUR POSTAL INSPECTOR
- CALL THE POLICE



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